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BRIEF FOR PLAINTIFFS IN ERROR.

IN THE

United States Circuit Court of Appeals,

For the Ninth Circuit.

October Term, 1892. No. 53.

JOSEPH ALEXANDER ET AL.,
Plaintiffs in Error,
vs.
THE UNITED STATES,
Defendant in Error.

Docket No. 4.

Error to the District Court of the United States for the District of Idaho.

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BRIEF FOR PLAINTIFFS IN ERROR.

Suggestion of Diminution of the Record.

The printed record (53, 54, 96,) shows that a statement of the case was settled by Judge J. L. Logan, who had tried the cause. The original having been lost or mislaid, an order was made substituting a copy therefor. This order is not in the record, and the plaintiffs in error pray that they be permitted to supply the omission by causing to be filed a certified copy of said order, or that such order be made by this Court in that behalf as may be meet and proper.

Statement of the Case.

This action was commenced Aug. 14, 1886, in the District Court, First Judicial District, Idaho Territory, to recover from the sureties on the bond of one Hibbs as postmaster, $10,000 as the penalty thereof (Trans. 6–13).

The complaint alleged (Pars. III and IV) that between April 1, 1884, and June 25, 1885, inclusive, Hibbs had received, as postmaster, large amounts of money belonging to plaintiff, aggregating $20,645.$\frac{28}{100}$ for which he had *failed to account*; by reason whereof the sureties had become *indebted* to plaintiff in the full penalty of the bond, and that no part thereof had been paid.

The answer denied the breaches alleged, and the averment of non-payment (Trans. 15–17).

A demand for the items of the account referred to in the complaint, was made by defendants on plaintiff's attorney, Oct. 8, 1888 (Trans. 33–34).

Nov. 24, 1888, the cause was tried by a jury, who, by direction of the Court, found for the plaintiff. Judgment was accordingly entered the same day (Trans. 18 to 20, 50).

Notice of intention to move for a new trial was filed Dec. 1, 1888 (Trans. 20–21).

A statement of the case, with exhibits, on motion for a new trial, was settled (Trans. 21 to 53, 54 to 95).

The motion was submitted to Judge Logan, April 15, 1889. Nov. 27, he signed an order, which was filed Dec. 6, 1889, denying the motion (Trans. 95–96).

May 25, 1891, this order was set aside by Judge

Beatty, on motion noticed May 19, 1891, and heard the 22d, after the cause had been removed to the United States District Court—because Judge Logan had ceased to be Judge, either *de jure* or *de facto* when he signed or filed the order, owing to the previous appointment, qualification and assumption of duties, of Judge Willis Sweet as his successor (Trans. 95, 96 to 102, 118, 119).

Nov. 30, 1891, the motion for a new trial was submitted to Judge Beatty, and was denied Dec. 14, 1891 (Trans. 102–107, 110, 111, 121, 122).

A petition for a writ of error was filed March 21, 1892 (Trans. 107–111), from which it appears—

(a.) That a former judgment in favor of plaintiff had been reversed by the Territorial Supreme Court.

(b.) That Judge Sweet took no action in the case because he had been of counsel for the plaintiffs in error.

(c.) That no Judge for the United States District Court was appointed until March 7, 1891.

An assigment of errors was filed April 2, 1892 (Trans. 112–114).

A writ of error and a citation were issued on said day returnable May 2, 1892, on which day the record was filed here (Trans. 5–6, 123 to 126).

A supersedeas bond was filed April 2, 1892 (Trans. 118).

Pending the action, W. F. Kettenbach died, and the administrator of his estate, F. W. Kettenbach, was substituted (Trans. 121–122).

The Trial and Proceedings Therein.

The plaintiff below introduced in evidence a certified copy of the bond sued on (Trans. 24, 29, 38–39). Also certified copies of statements of two several demands served by mail on Hibbs and his sureties (Exhibits B and C, Trans. 37–39, 54–56, 56–58). Also, certified by the Sixth Auditor of the Treasury for the Post-office Department, first, a statement of the account current of Hibbs, and secondly, a transcript of the money order account of said Hibbs (Exhibits D and E, Trans. 40–41, 57–69, 69–95). To the introduction of each one of these exhibits, the defendants below objected on the ground that although copies thereof had been demanded from the plaintiff, none had ever been furnished them; but the objections were overruled, and the defendants excepted (Trans. 40–41).

The testimony of Krebbs, in connection with Exhibit D (Trans. 36–39, 68), shows that S. L. Thompson succeeded Hibbs as postmaster *on* May 24, 1885, (being 3 weeks up to June 13, 1885,) and that on June 13, or the day after, Krebbs succeeded Thompson.

The defendants on their part sought to prove by one of themselves, W. F. Kettenbach, that through his instrumentality or that of the other sureties, certain moneys had been paid on account of the liability of Hibbs. On objections by plaintiff that the evidence was incompetent, immaterial and irrelevant, it was excluded, and exceptions saved by the defendants (Trans. 42–4).

By the testimony of J. W. Reid, on behalf of defendants, it was shown that through the instrumen-

tality of one of the sureties, $10,513.$\frac{35}{100}$ had been stopped or found in the hands of Hibbs, *after* he ceased to be postmaster, and that the government had received $1200 from two several banks—all of which had been admitted to the witness at Washington by the Sixth Auditor (Defendant's Exhibit H). All said several sums were paid to the government on account of the liability of Hibbs (*Ib.*).

Assigment of Errors.

The plaintiffs in error specify the following as showing wherein the lower Court erred, to-wit:

1. In overruling their objections to the question put to the witness Krebbs by the plaintiff, viz.—"Q. "Did you ever receive any orders from the Postoffice "Department in regard to making any demands on "Mr. Hibbs?"

2. In overruling the objections to their admission of Plaintiff's Exhibit D, being a certified statement of the account current of Hibbs.

3. In overruling their objections to the admission of Plaintiff's Exhibit E, being a certified transcript of the money order account of Hibbs.

4. In sustaining the objections of the plaintiff below to each of the several questions propounded to the witness Kettenbach, from whom the plaintiffs in error sought to adduce testimony tending to show that through his instrumentality, or that of the other sureties on the bond of Hibbs (the witness being a surety himself), certain moneys had been paid to the government on account of the liability of Hibbs—*after* Hibbs had ceased to be postmaster.

5. In instructing the jury as follows:

"Gentlemen of the jury: By direction of the Court, "you will find a verdict for the amount of $10,000.00."

6. In overruling the motion of plaintiffs in error for a new trial.

Points and Authorities.

At the time this action was commenced, the Territory of Idaho had adopted a Code of Civil Procedure, modeled upon, and almost identical with, that of California (General Statutes of Idaho, 1880–1, 1–226), reenacted in the Revised Statutes of 1887. That code provided fully for pleadings, practice, evidence, new trials and appeals. Under it an appeal lay either from a judgment or from an order granting or refusing a new trial, or from both *at the same time* (See *Carpentier* vs. *Williamson*, 25 Cal. 167–8). So that the granting or refusing of a new trial was not a mere matter of discretion; since if that were so no appeal from an order refusing it would be allowable. (*Schultz* vs. *Keeler*, 13 Pac. R. 481.)

Under that code an appeal from an order denying a new trial necessarily affects the merits of the judgment, since a reversal of the order vacates the judgment, although *it* may have been affirmed on an independent appeal.

"New Trials," 16 Am. and Eng. Ency. of Law, 699, 700 and notes.

Sharon *vs.* Sharon, 77 Cal. 633, 652–5.

Fulton *vs.* Hanna, 40 Cal. 278, 280.

Waldeck *vs.* Murdock, 23 Cal. 540–9.

Hanscom *vs.* Tower, 17 Cal. 518–521.
Cf. Howell *vs.* Thompson, 70 Cal. 635–6–7–8;
McDonald *vs.* McConkey, 57 Cal. 325–6;
Emma S. M. Co. *vs.* Park, 14 Blatchf, 411;
Mount *vs.* Simons, 3 Utah, 230.

Territorial Courts are not *Courts of the United States*, and their proceedings are governed solely by the modes of procedure or practice established by territorial laws.

Good *vs.* Martin, 95 U. S. 98.
Reynolds *vs.* U. S. 98 U. S. 154.
Hornbuckle *vs.* Tooms; 18 Wall. 648.

So that when, under the Admission Act of July 3, 1890, (25 U. S. Stats. at Large, 215, Sec. 18), this cause was transferred to the United States District Court, "due course of law" required that Court to consider this case, *pro hac ~~pro~~ vice*, as if it had been the Territorial Court itself and no removal had occurred (*Bates* vs. *Payne*, 4 Dillon, 265–6–7). The fact of removal did not make the rights of the moving parties any less because the United States Court denied the motion for a new trial than if the order had been previously made by the Territorial District Court. The removal did not make the granting or refusing of the new trial a mere matter of discretion, where it was not so before in the Territorial Courts (*Bates* vs. *Payne*, *supra*).

The right to a review on appeal, or, on a writ of error, which is the same thing, has been held to be property.

People *vs.* Cadman, 57 Cal., 562.

Statutes allowing such review, being remedial, must be liberally construed.

Payne *vs.* Davis, 2 Mont., 381–2.
Appeal of Houghton, 42 Cal., 45.
Bechtel *vs.* U. S., 101 U. S., 597–9, 600.
Wallace *vs.* Moody, 26 Cal., 387.
Cullerton *vs.* Mead, 22 Cal., 95.
White *vs.* Tug Mary, 6 Cal., 462.

This Court has jurisdiction on appeal or writ of error to review *final decisions* where the appeal is taken or the writ sued out within six months *after* the *entry* of the *judgment*, *order* or *decree* sought to be reviewed (Act of March 3, 1891, Secs. 6, 11, 25 U. S. Stats. at Large, 826–1115). But pending a motion for a new trial, the judgment is suspended, and becomes *final* only when the motion is denied.

Rutherford *vs.* Penn. Co., 1 Fed. R., 456.
Brown *vs.* Evans, 8 Sawyer, 502;
S. C. 18 Fed. R., 56.
Texas Ry. Co. *vs.* Murphy, 111 U. S., 715–7.
Slaughter House Cases, 10 Wall., 273–289.
Brockett *vs.* Brockett, 2 How., 238.
Cf. Nevada B'k. *vs.* Steinmetz, 65 Cal., 219.

On appeal from the judgment, the Territorial Supreme Court would have reviewed the same on the statement on motion for a new trial, which was there regarded as, and in fact it has all the elements of, a *bill of exceptions.*

U. S. *vs.* Alexander, 17 Pac. R., 746–7.

Bradbury *vs.* Improvement Co., 10 Pac. R., 620;
S. C., affirmed, 132 U. S., 505.
Schultz *vs.* Keeler, 13 Pac. R., 481.

Under the maxim *utile per inutile non vitiatur*, matters contained in the bill of exceptions here which might be improper in one prepared in a United States Circuit Court, may be disregarded as superfluous. Otherwise it should be considered sufficient and proper for a review of the judgment here (*Bates* vs. *Payne*, 4 Dillon, 265–6–7).

Nothing appearing to the contrary, the presumption is that the *bill of exceptions*, styled *statement of the case* in the record, was properly settled.

Sullivan *vs.* Wallace, 73 Cal., 307–9, and cases cited.

The plaintiffs in error have more than a mere "moral right" (*Freeborn* vs. *Smith*, 2 Wall. 160–175) to have a reversal of the judgment or the order denying the new trial, or both. The *order* is itself a FINAL *decision* within the meaning of the act creating this Court (*Schultz* vs. *Keeler*, 13 Pac. R. 481). The citation just made shows that appeals from orders refusing new trials were allowed in accordance with the established practice in Idaho. The plaintiffs in error had the right to rely upon their motion for a new trial and a prospective appeal from a denial thereof as sufficient to preserve their rights (*Hollinshead* vs. *Van Glahn*, 4 Minn. 190; *Thomasson* vs. *Wood*, 42 Cal. 416–7–8; *Fuchs* vs. *Treat*, 41 Wis. 404–7, distinguishing *Stowell* vs. *Eldred*, 39 Wis. 616), and thereby ultimately affect

the merits of the judgment, as we have already shown it may be done, since the granting or refusing of a new trial is not purely discretionary. Especially should this contention be conceded in view of the case of *Bates* vs. *Payne*, *supra*, and Section 18 of the Admission Act, which certainly was not intended to deprive these plaintiffs of any rights which they would have continued to possess had this cause been prosecuted to a finality in the Territorial Courts before the admission.

To a review of the order, no other bill of exceptions is required than that on which the motion was made.

Walden *vs.* Murdock, 23 Cal., 549, 550, and cases cited.

The objections to the testimony of Krebbs (Trans. 37) in reference to orders from the postoffice department empowering him to make demands on Hibbs, should have been sustained. His testimony was not the best evidence, since the orders must have been in writing. Even if Sec. 890, U. S. Rev. Sts., were applicable, the objections were not obviated. Sec. 890 does not make the certified statements (Exhibits B and C) proof, or even evidence of the agency or authority of Krebbs to make the demands. But Sec. 890 is inapplicable because the admissibility, competency of evidence, and the sufficiency or mode of proof is governed by the *lex fori.*

"Conflict of Laws," 3 Am. and Eng. Ency. of Law, 540 to 542 and notes.

Cooley, Cons. Lim., 6th Ed., 349, 350; 592 and 593, notes.

People *vs.* Brady, 40 Cal., 198.
People *vs.* McGuire, 45 Cal., 56.

At the time of the trial, the Idaho Revised Statutes, 1887, from Sec. 5950, p. 678, to Sec. 6150, p. 701, covered the whole subject of evidence, thus making Sec. 890 inoperative in view of the decisions in 95 U. S. 98, 98 U. S., 154, and 18 Wall., 648, *ante*.

Exhibits D and E should have been excluded for failure to deliver copies thereof after demand made by plaintiffs in error. In the nature of things, evidenced by the very character of the bond sued on, the essential evidence for plaintiff had to consist of accounts running over a long period. Sec. 4209, Rev. Sts. of Idaho (quoted in full in Brief of Defendant in error, pp. 6, 7) should be liberally construed, being remedial, and also because the code itself—Sec. 4 (Rev. Sts., 1887, p. 61)—provides that *it* and *all proceedings* thereunder "are to be liberally construed, with a view to effect their objects and to promote justice." Sec. 4875, Rev. Sts., quoted by defendant in error (Brief p. 7), is not applicable. His contention would nullify Sec. 4209; for a party could always be relegated to Sec. 4875. That this was a proper case for a bill of items, Sec.—

"Bill of Particulars," 2 Am. and Eng. Ency. of Law, 244 to 247 and notes.

As against the principal Hibbs, the action could have been brought on the bond or on the accounts. If on the latter he certainly would have been entitled to a copy thereof. If on the bond, could it be said that

the mere change in the *form* of the action (although the Code provides but for *one form of civil action*—132 U. S., 502—) without a change in the *substance*, made any differance? If not, why should any distinction be made where the sureties alone are sued?

Having regard to the object to be accomplished by Sec. 4209 (*Burr* vs. *Dana*, 22 Cal., 20), the Court should look beyond its mere wording. If it ascertains that the essential basis of the action is an account containing a *series* of items, arising during a long period, without the production of which the claim cannot be sustained, the Court should hold that the action comes within the spirit of Sec. 4209.

Oates *vs.* National B'k., 100 U. S., 244.
Leavenworth etc., R. R. Co., *vs*, U. S., 92 U. S., 733.
Wilson *vs.* Third N. B'k., 103 U. S., 770.
U. S. *vs.* Buchanan, 9 Fed. R., 690–1.
Smythe *vs.* Fiske, 23 Wall., 374.

The very length, generality and obscurity of the accounts evince the propriety of the demand for copies thereof.

The Court should have permitted the witness Kettenbach (Trans. 42–4) to testify. It was sought to prove by him an absolute payment on the liability of Hibbs. This is not covered by Sec. 951, U. S. Rev. Stats., assuming that it controls, since that section has reference only to *credits* or *off-sets*. But that section is inoperative in a case not tried in a *U. S. Court* for the same reason that Sec. 890 is claimed to be inap-

plicable here. The government became a mere private suitor, and was amenable to the rules of evidence in force in the Territory.

The Court erred in instructing the jury to find for the plaintiff. No demand on Hibbs or his sureties to account or to pay was shown. The certified statements (Exhibits B and C) were *res inter alios actæ*, mere *hearsay* and of no weight whatever (*Minna Queen* vs. *Hepburn*, 7 Crauch, 290–5–6; *Bookman* vs. *Stegman*, 105, N. Y. 621). Section 890 U. S. Rev. Stats. is inapplicable as has been shown. For the same reason Sec. 951, U. S. Rev. Stats. does not control, and consequently there was no evidence adduced, on the part of the plaintiff, showing non-payment by either Hibbs or his sureties. This was material; it was necessary to aver non-payment in the complaint and equally necessary to prove it.

Goddard vs. *Fulton*, 21 Cal. 430–6.
Scroufe vs. *Clay*, 71 Cal. 123–4.
Davanay vs. *Eggenhoff*, 43 Cal. 395–7.
Roberts vs. *Treadwell*, 50 Cal. 520.

Exhibits D and E did not of themselves prove non-payment. Allowing them all the force possible, in view of their generality, especially the money order account (Exhibit E, Trans. 93) wherein occurs the obscure entry "issued between Apr. 17 and 23, 395 "money orders issued, not accounted for, $38,515\frac{15}{100}$," and because both accounts contain entries *pro* and *con* as to matters arising after Hibbs had ceased to be